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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1182

UNITED BROADCASTING COMPANY, INC., a Corporation, and U. B. C. SALES, INC., a Corporation, and their Officers, and RICHARD EATON,

Petitioners,

versus

JAY J. ARMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES F. HULSE

Attorney for Petitioners

OF COUNSEL:

SCOTT, HULSE, MARSHALL & FEUILLE

11-D El Paso National Bank Building

El Paso, Texas 79901

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Petitioners-Plaintiffs, who were Defendants in a Cross-Complaint, to-wit United Broadcasting Company, Inc., a Corporation, and U. B. C. Sales, Inc., a Corporation, and their Officers, and Richard Eaton pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, said Court's opinion and judgment being dated January 20, 1975, and the Petition for Rehearing filed by Petitioners having been denied by the said Court of Appeals on February 10, 1975.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at F.2d (not yet reported) and is copied in Appendix A, infra, pp. 1a-10a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on January 20, 1975, and your Petitioners' Petition for Rehearing in that Court was denied by said Court on February 10, 1975, and a copy of the judgment of said Court is appended to this Petition in Appendix A, infra, pp. 1a-10a, and the Order denying said Petition for Rehearing is appended to this Petition in Appendix B, infra, p. 10a-11a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Rule 19.1(b), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The questions here presented are:

(1) Respondent testified that in connection with certain aspects of the case, he had bribed a District Judge, and bugged the Judge's office, and had bribed both the District Attorney and an attorney for an opposing party, all in the Republic of Mexico. The Trial Judge prevented counsel for Petitioner from arguing to the jury that these facts indicated a lack of credibility on the part of the Respondent, and the Court stated to the jury both that bribing a public official is not a crime in Mexico, and that "that's the way they do business down there", and further stated, erroneously, that one of Petitioner's witnesses had testified "that's the way they do business in Mexico", although there is no

evidence in the record to sustain such statements by the Court. The Court of Appeals approved these statements by the Trial Court, stating the Trial Court's observations were nothing more than an attempt to inform the jury they should consider all the circumstances in assessing the impact of an illegal act on Armes' credibility, and that there was no error in the Trial Court's comments.

In this connection the following questions are presented:

(a) The error of the Trial Court in preventing Petitioners' counsel from arguing said facts in connection with the issue of Respondent's credibility.

(b) The error of the Trial Court in stating, wholly outside the record, that bribing a public official is not a crime in Mexico, and that that's the way they do business down there, which was actually an instruction to the jury that Respondent was not guilty of an illegal act in bribing said public officials, and the Trial Court thereby destroyed Petitioner's position that Respondent's acts of bribing bore strongly on the question of his credibility.

(c) The Court of Appeals' statement that the Trial Court's observations were nothing more than an attempt to inform the jury they should consider all circumstances in assessing the impact of an illegal act on Armes' credibility is so at variance with the undisputed facts in the record as to raise the question that the Court of Appeals' opinion should be reversed in keeping with the principle that our jurisprudence requires that legal decisions and judgments be based on the facts in the record, and not otherwise.

(d) And, most importantly, the statements of the Trial Court above referred to, and the opinion of the Court of Appeals approving them, constitute a direct slap at a sister Republic, and the standards used by it in carrying on public business, which this Court should not permit to stand.

(2) The question whether a written contract between the parties which contained recitations showing it covered the subject matter of this action is to control, or whether a judgment can stand which is based upon alleged prior oral agreements which contradict and vary the terms of the written agreement, in violation of the parol evidence rules.

(3) The question whether a judgment for Respondent be permitted to stand, based on a percentage of the proceeds of a sale of XEWG, when Respondent admits XEWG has not been sold.

THE LAW INVOLVED

The law involved under the questions relating to the confessed bribery by Respondent of public officials in the Republic of Mexico is (1) that bribery is an illegal act. It is made illegal by statute under the State laws of Texas, Secs. 158, 160, 167, 177, Penal Code of Texas, and is also made a crime in the laws of the United States, 18 U.S.C.A. Sec. 201. It is a felony. As there was neither pleading nor proof of the laws of Mexico, they are presumed to be the same as the law of the forum. Foreign laws must be pled and proved, *Rowan vs. C.I.R.*, 120 F.2d 515 (5th Cir. 1941). In the absence of such pleading and proof, the foreign law is presumed to be the same as the domestic, *Medina vs. Hartman*, 260 F.2d 569 at 570 (9th Cir.); *Molina vs. Sovereign Camp W.O.W.*, 6 F.2d 385 at 397, 398. Since Respondent testi-

fied to his bribing the said public officials, and since this is a crime, which is a felony, the remaining legal point relates to the error of the Trial Court preventing Petitioners' counsel from arguing to the jury that these facts bore upon Respondent's credibility as a witness, and to the error of the Trial Court in instructing the jury that such acts were not illegal in Mexico, that this is the way they do business in Mexico, and that Petitioners' witness Gonzalez Vargas had so testified, although Gonzalez Vargas had not so testified.

There is also involved the law relating to the parol evidence rule, since there was a written agreement between the parties which purported to cover the matters involved in this case, but the Trial Court permitted Respondent to testify to alleged oral agreements, on the basis of which a verdict was rendered in favor of Respondent, all contrary to the decisions of the Court of Appeals for the Fifth Circuit in *Harville Rose Service vs. Kellogg Company*, 448 F.2d 1346 (5th Cir.), a case which arose in Texas, and in *Mathews vs. Drew Chemical Corp.*, 475 F.2d 146 (5th Cir.), a case which arose in Florida.

There is also the related question that Respondent's cause of action being based upon a percentage of the proceeds of a sale of Station XEWG, and it being undisputed said station has not been sold, the judgment in favor of Respondent is not supported by the facts, and is erroneous.

STATEMENT

Respondent testified to participating in giving a $3,000.00 bribe to a Judge of a Court, and bugging the Judge's office, (Doc. 92) A. pp. 150-151; a $3,500.00 bribe to the District Attorney (Doc. 92) A. p. 122; and a $1,-

000.00 bribe to the attorney for an opposing party. (Doc. 92) Tr. p. 191, all in connection with the subject matter of this case, these acts being done in Mexico. On cross-examination he further testified about giving these bribes, that he participated in giving $2,000.00 to the District Attorney, (Doc. 92) A. p. 149, and described it as a bribe, (Doc. 92) A. p. 149 and that he participated in giving $3,000.00 to a Judge (Doc. 92) A. p. 150.

During the argument of counsel for Petitioners to the jury, on the question of Respondent's credibility, the giving of these bribes by Respondent was referred to, coupled with the statement that a bribe is illegal and that it is morally dishonest — either in El Paso, or in Mexico — at which time the Court interrupted, and said, "Mr. Hulse, there is no testimony that this action is illegal. To the contrary, your witness, Mr. Gonzalez Vargas, said that's the way they do business in Mexico." (Doc. 92) A. p. 186. The Court continued with the statement, "If I'm wrong, the jury of course will determine whether or not, but I understand Mr. Gonzalez Vargas says that's the way they do business, and he participated. . . ." (Doc. 92) A. p. 186. And the Court further said, ". . . but I mention that fact because there is nothing in the record so far as what was done being illegal in Mexico. Call it what you will, but my recollection was that Vargas said that's the way they do business, but the jury will decide that, and you'll remember what his testimony was."

Counsel stated he was arguing this as going to the credibility of the Respondent as a witness. (Doc. 92) A. p. 188.

In the Court's charge to the jury, at the conclusion of the case, the Court told the jury it was up to them to

determine the credibility of the witnesses. (Doc. 92) A. p. 192. and then referred to the conduct of Mr Armes in Mexico. (Doc. 92) A. p. 192. and said that no testimony was offered as to the laws of Mexico. but the way the Court remembered it Mr. Gonzalez Vargas said that the mordida (bribe) was a way of doing business over there. (Doc. 92) A. p. 192: and that it certainly isn't right over here and that he did not think anybody would personally approve of matters being made that way. but that the jury could consider all of Mr. Armes' conduct as well as Mr. Eaton's in arriving at the credibility to be given to it. He then added, "But it is not any basis for refusing to pay Mr. Armes any money if he's entitled to it. That would be no defense to this suit. And that's what I meant to bring to your attention about it." (Doc. 92) A. p. 192. The Court then continued. "But is not any defense as far as this suit is concerned. of Plaintiff recovering anything if he's entitled to any fees for services that he rendered." (Doc. 92) A. pp. 192-193.

All of these statements by the Court were excepted to by Petitioners. (Doc. 92) A. p. 200.

Gonzalez Vargas did not state that the use of bribes was the customary way of doing business in Mexico. On the contrary, on cross-examination by counsel for Respondent. the nearest the examination of this witness came to it was as to whether he was well versed in this type of dilemma or legal problems with sidelines that can sometimes lead to illegalities. And his answer was, "Well, I don't know about the illegalities." (Doc. 92) A. p. 141. At that point the Court said, "I don't think we can get into that. What he did, but that's —", at which point counsel for Respondent said he would strike the question. (Doc. 92) A. p. 141.

Respondent, in effect, admitted their illegality, when he said, "I wanted to do it legally, and this is why I wasn't agreeing to that." (Doc. 92) Tr. p. 295.

The vice in the Trial Court's actions was (1) stopping Petitioners' counsel from arguing the "bribery" facts in connection with the question of Respondent's credibility, and (2) the Trial Court's statements at two different times, that "there is no testimony that this action is illegal. To the contrary, your witness, Mr. Gonzalez Vargas said, "that's the way they do business in Mexico." This stopped Respondent's counsel from arguing these facts in connection with Respondent's credibility, and was an affirmative statement by the Court utterly destroying Respondent's position on the question, and the mere addition by the Court of the statement that the jury will remember the testimony and determine the credibility of the witnesses did not cure the irreparable injury to Petitioners' case already inflicted by the Court by these statements which he made. This points out the error of the Court of Appeals when, in passing on this point, it said in its opinion:

> "These comments were part of the Trial Judge's instructions to the jury concerning the importance of assessing the credibility of witnesses. Taken in context, the Trial Court's observations were nothing more than an attempt to inform the jury that they should consider all the circumstances in assessing the impact of an illegal act on Armes' credibility. We find no error in his comments."

It is submitted that the Trial Court effectively destroyed Respondents' position on this issue. He attributed to Gonzalez Vargas a statement that Gonzalez Vargas did not make (Doc. 92) A. p. 141, and he in-

structed the jury that bribing public officials is a way they do business in Mexico. There was no evidence to support this statement by the Court. In the absence of evidence, the Court will not take cognizance of the laws of another without pleading and proof, *Rowan vs. C.I.R.*, 120 F.2d 515 (5th Cir. 1941); *Medina vs. Hartman*, 260 F.2d 569 at 570 (9th Cir.); *Molina vs. Sovereign Camp W.O.W.*, 6 F.2d 385 at 397, 398. There is no evidentiary basis in the record in this case for said statements by the Trial Court, and he was one hundred eighty degrees wrong in his reference to the testimony of Gonzalez Vargas, and the Petitioners were irreparably injured by these erroneous statements and charges to the jury by the Court; and the approval thereof by the Court of Appeals as shown by the above quotation from the Appellate Court's opinion is not justified by the facts in the record in this case.

Moreover, the statement by the Trial Court that bribing public officials is the way they do business in Mexico is a gratuitous slap at the character of a sister Republic, which was completely unsupported, and which does it an injustice which the Courts of this country should not permit to stand, and which therefore should be corrected by this Honorable Court.

II.

Respondent and Petitioners Eaton and United Broadcasting Co., Inc. entered into a written contract on March 6, 1971, in which it was recited Respondent would perform certain services there set out, and that Respondent would be compensated in the following manner: Radio Station XEWG in Juarez, Mexico shall be sold at a price acceptable to both parties within thirty (30) days after the delivery of the documents

specified in Paragraph 1. and Petitioners shall pay to Respondent upon the consummation of the sale of Radio Station XEWG, in accordance with the terms of this agreement, 20% of the net amount to be received by Petitioners upon such sale. Ex. I. A. pp. 253-256; (Doc. 92) A. p. 112. Respondent testified to promises by Petitioner Eaton made prior to March 6, 1971, to pay him $80,000.00, being 20% of the sale price of Radio Station XEWG in Juarez, Mexico, on the basis of XEWG having already been sold for $400,000.00. (Doc. 92) A. pp. 103, 105, 106, and the jury's verdict, on which the judgment was based, assessed Respondent's damages at $80,000.00, with the specific findings that Eaton agreed to pay Respondent $80,000.00 plus expenses, and that Eaton represented to Appellee said station had been sold for $400,000.00, and that Appellee would be paid $80,000.00 when Eaton was paid for the station. (Doc. 71) A. p. 58. This is contrary to the above quoted provision of the written contract, and varied an express term of the written agreement.

Moreover, it was admitted by Respondent that Station XEWG had not been sold, Respondent's Brief, p. 11. Thus, there were no proceeds of a sale from which the money in question was to be paid.

The judgment in favor of Respondent is unauthorized, as it is based upon alleged prior oral agreements which were contrary to the written agreement between the parties. That this is contrary to established law is shown by two prior decisions from the Fifth Circuit. *Harville Rose Service vs. Kellogg Company*, 448 F.2d 1346 (5th Cir.) and *Mathews vs. Drew Chemical Corp.*, 475 F.2d 146 (5th Cir.).

It is clear the Court of Appeals' opinion on the parol evidence rule is erroneous. The opinion clearly shows

that it approves the prior oral agreements as an adequate basis for the verdict and judgment, to the complete emasculation of the parol evidence rule, and to the exclusion of the written contract as a basis for determining the rights of the parties. The opinion goes so far as to state, "Despite the confusion surrounding the disposition of the radio station, there was ample evidence to support the jury's finding that the station was sold and that Eaton received the proceeds." This, in spite of the fact that Respondent, in his counterclaim, alleged Eaton represented said station had been sold for $400,000.00, and Respondent was to get 20%, or $80,000.00, but that this representation was false. App. p. 31. Respondent's Brief, p. 11, states the station had not been sold, and Respondent's counsel so admitted in oral argument before the Court of Appeals. It is therefore clearly outside the record in the case for the Court of Appeals to put its affirmance on the ground the station had been sold, and Eaton had been paid for it.

REASONS FOR GRANTING THE WRIT

The Court below has affirmed the actions of the Trial Court in stating to the jury, and in instructing the jury, that Respondent's bribing a District Judge and other officials in Mexico was not shown by the evidence to be illegal, and that one of the Petitioners' witness had said that's the way they do business in Mexico, and the Court in doing so not only cut off Petitioners' counsel from arguing these matters on the question of Respondent's credibility as a witness, but also reflected upon the manner in which judicial matters are conducted in the Republic of Mexico. This was an unwarranted statement impugning the integrity of the public judicial officials of our sister Republic. The Court

of Appeals passed over the irreparable injury done to Petitioners' case with the statement that these comments were part of the Trial Judge's instructions to the jury concerning the importance of assessing the credibility of *witnesses, and were nothing* more than an act to inform the jury they should consider all the circumstances in assessing the impact of an illegal act on Armes' credibility; and the said Court did not mention the fact that these statements by the Trial Court were an unwarranted impugning of the conduct of judicial affairs in the Republic of Mexico.

This Writ should be granted so that justice may be done on behalf of Petitioners whose case was so unwarrantedly destroyed by the Trial Court's statement in support of Armes credibility, and further, in order that the unwarranted slap at public officials of our sister Republic may be corrected in the judicial records of this country.

This Writ should also be granted for the reason that the Court of Appeals has affirmed a judgment wherein a written contract covering the rights and obligations of the parties was denied effect, and instead, the judgment was based upon alleged prior oral agreements between the parties. The right of a citizen to rely on a written contract is fundamental, and rights based on written contracts generally are threatened when a party is permitted to substitute his testimony as to an oral agreement as the basis for the Court's judgment, in lieu of having the rights and obligations of the parties judged by the provisions of the written agreement.

This Petition for a Writ of Certiorari therefore should be granted so that this Honorable Court can correct these errors on the part of the Courts below.

CONCLUSION

For the reasons set forth above. it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

_____

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing brief has this date been served upon opposing counsel of record by placing same in the United States Mail. postage prepaid and properly addressed.

March ____. 1975.

_____

JAMES F. HULSE

APPENDIX A

UNITED BROADCASTING COMPANY, INC., U. B. C. Sales, Inc., and their officers and Richard Eaton,
Plaintiffs-Appellants.

versus

Jay J. ARMES,
Defendant-Appellee.

No. 73-3824.

United States Court of Appeals,
Fifth Circuit.

Jan. 20, 1975.

Appeal from the United States District Court for the Western District of Texas.

Before GEWIN, GOLDBERG and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

In this Texas diversity case we must interpret a series of oral and written contracts for personal services undertaken and performed in the context of a most extraordinary set of facts. Plaintiff Richard Eaton and two corporations of which he is president appeal from a judgment for $80,000, plus court costs, entered on a jury verdict in favor of defendant and counterclaimant Jay Armes. We affirm.

I. Factual Background to the Dispute

A. The Relationship Between Eaton and Estella Vega Padilla

Richard Eaton is a Washington businessman who is president and sole stockholder of United Broadcasting Company and its wholly owned subsidiary, U.B.C. Sales, Inc. In 1964 Eaton met Francisco Nunez, who owned radio station XEWG in Juarez, Mexico. Eaton wanted to buy the station but learned that under Mexican law, American citizens cannot own property or government broadcast licenses in Mexico. Eaton was accompanied by Estella Vega Padilla, his close friend at that time and later his housekeeper. She is a Mexican citizen and suggested that Eaton register the title to the station and broadcast license in her name. Between the time of this purchase and 1970, Eaton loaned Estella Vega Padilla approximately $450,000 to operate XEWG and several other Mexican stations. This loan agreement, according to Eaton's statement in his deposition, was not reduced to writing until December of 1971.

At about the same time that radio station XEWG was purchased by Eaton and put in Estella Vega Padilla's name, Eaton was arranging the adoption of a child by his son and daughter-in-law. He urged the couple to adopt a child, in the hope that it would revive their failing marriage. On the advice of a Miami doctor, he arranged for the adoption of a child about to be born out of wedlock to a young woman who felt she could not keep the child. At the last minute, Eaton's son and daughter-in-law decided not to go through with the arrangement. The baby had already been delivered, and so Eaton assured his daughter-in-law that he would care for the child himself. He persuaded Estella

Vega Padilla to assume day-to-day responsibility for the child, which she did.

In March 1970, because of a dispute over the profits from the radio station, Estella Vega Padilla left Eaton and headed for Mexico with the child.

B. The Contracts Between Eaton and Jay Armes

Eaton then sought the services of defendant Armes, a private investigator in El Paso, Texas. On April 29, 1970, he and Armes concluded an agreement pursuant to which Armes was to recover the child for a fee of $1,500. Eaton had information at this time that the child was in Juarez, Mexico. Armes learned, however, that the child was in Veracruz. When Armes told Eaton of his discovery, the two entered into a second agreement, this one oral, pursuant to which Armes was to recover the child in Veracruz. Further, he was to recover for Eaton all the properties Eaton had entrusted to Estella Vega Padilla: radio station XEWG in Juarez, Mexico, radio station XESM in Mexico City, and a house in Chevy Chase, Maryland. Armes testified that Eaton told him that XEWG had been sold for $400,000, out of which Armes would be paid $80,000 as soon as the necessary papers were procured and executed.

For nearly a year thereafter, Armes worked on his assignment from Eaton. The child was returned by Armes to Eaton in October 1970. By March 1971, Armes had completed most of the arrangements for the return of Eaton's property. As a result of Armes' efforts, Estella Vega Padilla was extradited from Mexico City to Juarez. Armes initiated proceedings against her for criminal fraud. Faced with the serious threat of prosecution, Estella Vega Padilla sought to make

amends. She executed a power of attorney authorizing a lawyer in Juarez, Mr. Vargas, to transfer the radio stations to another Mexican party. Armes also recovered from Estella Vega Padilla the deed to the Maryland house that Eaton had entrusted to her.

On March 6, 1971, Eaton and Armes concluded a third agreement, this one written, which recited that when Armes turned over the deed to the Maryland property and the papers necessary for the transfer of the radio stations, XEWG would be sold within thirty days and 20 per cent of the proceeds would be given to Armes in payment for his services. After delivering the documents sought by Eaton, Armes demanded his fee. A dispute developed over the agreements, and Armes filed suit in Juarez, intending to levy on the assets of the radio station (XEWG). Eaton filed suit in the United States District Court, Western District of Texas, and obtained an injunction against Armes' suit in Juarez. Armes counterclaimed for his fee. The jury returned a verdict in favor of Armes, and the court entered a judgment of $80,000 plus court costs, from which Eaton has appealed.

II. Plaintiff Eaton's Contentions on Appeal

A. The Meaning of the Agreements

The jury found, in answer to a special interrogatory, that Eaton agreed to pay Armes $80,000 plus expenses for his services. Eaton contends the jury's verdict is contrary to the express terms of the written contract of March 6, 1971, which, he asserts, is a reduction to writing of all the agreements between the parties. He argues, therefore, that any prior oral agreements are barred by the parole evidence rule and doctrine of merger. We have summarized the facts in some detail,

but it is clear that there is a conflict in substantial evidence sufficient to create a jury question, see Boeing Company v. Shipman, 5 Cir., 1969, 411 F.2d 365, 374-375 (en banc), and that the jury resolved that conflict adversely to defendants.[1]

It is apparent from all the testimony that the earlier oral agreements concerned several matters not mentioned in the written contract of March 6, 1971, most conspicuously the recovery of the child, which proved to be far more difficult than either party anticipated when they negotiated the original contract on April 29, 1970. Armes also performed services for Eaton subsequent to and not covered by the written agreement of March 6, 1971. For example, Armes testified that after he had completed all his obligations under the written contract, Eaton sent him back to Juarez for a duplicate title to the property in Maryland, one deed for which Armes had already delivered. Whatever the written agreement may provide concerning Armes' fee for the services listed therein, Eaton's promise to pay Armes $80,000 for the entire job survives from the prior oral agreement.

Eaton also complains of the jury's answer to a special interrogatory that station XEWG was in fact sold for $400,000. In light of our conclusion that the jury was correct in finding that Eaton promised Armes $80,000 for his services, the amount for which the radio station was sold does not affect Armes' rights under the contract. Nor is Armes' recovery dependent on whether the station was actually sold.

1 Under the circumstances, the district judge was fully justified, and did not abuse his discretion, in denying Eaton's motion for a new trial. See, e. g., United States v. Bucon Construction Company, 5 Cir., 1970, 430 F.2d 420, 423; Powell v. McIntire, 5 Cir., 1969, 415 F.2d 333.

Although the sale of the radio station was mentioned in the oral agreement, Eaton's oral promise to pay $80,000 for Armes' services was not tied to any specific proceeds. The promise given by Eaton in the March 6, 1971 written agreement merely identified one source of payment on which Armes could depend for compensation for his work. The sale of the station was part of Eaton's obligations under that agreement, not a condition precedent to those obligations. If Eaton failed to sell the station he breached the agreement just as surely as if he had sold the station but refused to give Armes any of the proceeds.

Moreover, there is evidence in the record that a sale did take place. Armes testified that Eaton told him the station had been sold to a Mexican company called Escarga, represented by Jesus Hernandez Gutierrez. The record includes a sale contract reciting that Gutierrez is to pay $400,000 to Richard Eaton for radio station XEWG, and that U.B.C. Sales, Inc. is to hold a promissory note in that amount until full payment is received. The record also contains a statement executed by Gutierrez, as owner of XEWG, authorizing the payment of all monies due the radio station to U.B.C. Sales, Inc. Despite the confusion surrounding the disposition of the radio station, there was ample evidence to support the jury's finding that the station was sold and that Eaton received the proceeds.

B. Errors Alleged to Have Been Committed at Trial

Eaton also assigns as error the following actions by the trial court: (1) refusal to exclude expert testimony and other evidence concerning the value of the radio station; (2) instructions to the jury that adverse inferences could be drawn from the failure of Eaton and Estella Vega Padilla to appear and testify; (3) refusal

to permit the reading of Eaton's pretrial deposition on the question whether he was too ill to appear: (4) instructions to the jury that the widespread occurrence of bribery and other misconduct in Mexico could be taken into account in considering the effect of Armes' misconduct on his credibility as a witness: (5) entry of an injunction by the district court against Eaton to restrain him from proceeding in a suit against Armes by Eaton for invasion of privacy in Washington, D. C. All of these contentions are without merit.

1. *The expert testimony.* In light of our conclusion that Armes' compensation was not dependent on the amount of proceeds from the sale of the radio station, whatever error may have been committed in allowing testimony on the value of the station was harmless.

2. *Failure of Eaton and Padilla to appear.* The trial judge instructed the jury that, if they found Estella Vega Padilla had knowledge of the facts in the case and was reasonably available to Eaton and less available to Armes, they could infer that her testimony would have been unfavorable to Eaton. This standard instruction was proper. C. McCormick, Law of Evidence § 249 at 534 (1954). The trial court obliquely suggested to the jury that the same inference could be drawn from Eaton's failure to appear, noting that the court had concluded there was no medical reason for Eaton's refusal to travel to El Paso. The instruction itself is a standard charge on credibility. See C. McCormick, *supra*, § 249; Wigmore on Evidence § 289 (1940). The trial judge's finding that Eaton was in fact able to appear is amply supported in the record.

3. *The reading of Eaton's deposition.* The trial court initially acceded to Eaton's request, supported only by a physician's unsworn statement, that he not

be required to attend the proceedings in El Paso for health reasons. See Fed.R.Civ.P. 32(a)(3)(C). During the taking of the deposition, however, Armes' counsel elicited from Eaton the admission that he travelled frequently by airplane on business matters. Moreover, Eaton used the occasion of Armes' attendance at the deposition to serve him with the complaint in Eaton's Washington lawsuit for invasion of privacy. These developments cast serious doubts on the validity of Eaton's earlier claim of physical incapacity. Thus when Eaton's counsel attempted to blunt the effect of his client's failure to appear by reading to the jury the portion of Eaton's deposition concerning his health, the trial court properly limited the testimony. Considering the facts elicited in the deposition about Eaton's physical capacity and Eaton's numerous business trips between New York and Washington, the court was fully justified in its ruling and we perceive no reversible error.

4. *The trial court's comments concerning bribery.* During plaintiff counsel's closing argument and in the instructions to the jury, the trial judge expressed his belief that Armes' use of bribery and other questionable practices in connection with the return of Eaton's property should be viewed in light of the prevalence of such practices in Mexico. The trial court made it clear that the jury was not to take his comments as approval of Armes' actions. These comments were part of the trial judge's instructions to the jury concerning the importance of assessing the credibility of witnesses.[2] Taken in context, the trial court's

2 Eaton's counsel conceded at oral argument in this Court that he was not relying on alleged illegality of the contracts between Eaton and Armes. Inquiry into possibly illegal acts connected with these contracts is foreclosed by state law, which we are bound to follow in this diversity case. Under Texas law, if a contract is not

observations were nothing more than an attempt to inform the jury that they should consider all the circumstances in assessing the impact of an illegal act on Armes' credibility.[3] We find no error in his comments. See Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 540, 78 S.Ct. 893, 902, 2 L.Ed.2d 953 (1958).

5. *The injunction against Eaton's suit in Washington, D. C.* The trial court enjoined Eaton from further proceeding in his suit against Armes in Washington for invasion of privacy and other torts. His judgment was obviously correct. Fed.R.Civ.P. 13(a) in pertinent part states:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . .

---

illegal on its face, its illegality must be raised as an affirmative defense. Kahn v. Harris, Upham & Co., Tex.Civ.App., 1952, 247 S.W.2d 139, 142, aff'd, 151 Tex. 655, 253 S.W.2d 647; City of Galveston v. O'Mara, Tex.Civ.App., 1941, 146 S.W.2d 416, 420, aff'd sub nom., City of Galveston v. Heffernan, 138 Tex. 16, 155 S.W.2d 912. Plainly this contract called for no illegal acts, either implicitly or by its terms, and illegality was not raised as an affirmative defense in the trial court.

3 The trial court's charge, in relevant part, was as follows:

> . . . I thought that Mr. Gonzalez Vargas said that this is the way, referring to the mordida [a Mexican idiom for bribery], that this is the way business is done over there.
>
> Well, of course, certainly [sic] isn't right over here, and we know that, and I don't think anybody would personally approve of matters being made that way. But listen to all the testimony.

Eaton's Washington suit alleges that, in connection with the collection of his fees, Armes made a number of threats to harm Eaton and the child, including a threat to kidnap the child and take her back to Mexico. Thus this claim clearly arises out of the same transaction as Armes' claim in the present suit and should have been pleaded as a counterclaim in the Texas federal court.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 73-3824

D. C. Docket No. 72-CA-152

UNITED BROADCASTING COMPANY, INC., U. B. C. SALES, INC., and their Officers and RICHARD EATON,
Plaintiffs-Appellants,

versus

JAY J. ARMES,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before GEWIN, GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed:

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 20, 1975

Issued as Mandate: Feb. 18, 1975

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3824

UNITED BROADCASTING COMPANY, INC., U. B. C. SALES, INC. AND Their Officers AND RICHARD EATON,
Plaintiffs-Appellants,

versus

JAY J. ARMES,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING
(FEBRUARY 10, 1975)

Before GEWIN, GOLDBERG and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.